NO. 56514-5-II

THE COURT OF APPEALS OF THE STATE OF WASHINGTON, DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

THELMA WINGER,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR MASON COUNTY

OPENING BRIEF OF APPELLANT

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A. INTRODUCTION

Thelma Winger cared for several animals at her home. The prosecution charged her with first degree animal cruelty, but the charging document did not include the critical facts alleging her behavior caused substantial pain for an "*extended*" period of time sufficient to cause considerable suffering as required by RCW 16.52.205. The State's case-in-chief about the neglect on or April 29, 2018 did not prove beyond a reasonable doubt the Wingers caused any of the animals substantial pain for an "extended" period of time sufficient to cause considerable suffering.

After the State rested its case, the trial court "orally" amended the Information concerning Pearl the cat from a first degree to a second degree offense. This was reversible error as it was violative of due process and the notice requirement.

During her trial, a witness revealed she had sent emails to the police about food the Winger animals were receiving, undercutting the State's allegations the Wingers neglected to feed the animals on April 29, 2018. Yet the police deleted these emails and never provided this material impeaching information to the defense, contrary to the requirements of *Brady v. Maryland*.

After police seized the animals, two animal rescue organizations volunteered to care for these animals no matter the cost to save them from euthanization. After the restitution hearing, the trial court transferred those cost assumed by these animal rescue organizations upon the Wingers as restitution. This imposition exceeded statutory authority because the Wingers could not be forced to pay for the voluntary choice of these organizations and the

resultant extraordinary costs of boarding these animals which was not foreseeable at the time the offenses were committed.

B. ASSIGNMENT OF ERROR

1. The Information was constitutionally defective as it *omits* the durational requirement that the negligent acts cause an animal substantial physical pain for an "extended" time period sufficient to cause considerable suffering, which is an essential element of first degree animal cruelty.

2. The State failed to prove beyond a reasonable doubt the negligent acts of starvation and dehydration caused substantial pain for an "extended" period of time sufficient to cause considerable suffering as required by RCW 16.52.205.

3. The State destroyed material evidence tending to exculpate the Wingers. This was a due process violation under the Fourteenth Amendment and also a *Brady* violation.

4. The mandatory forfeiture of all animals and a lifetime prohibition on owning animals in grossly disproportionate in violation of Article I, section 14 and the Eighth Amendment.

5. The court's order for the Wingers to pay restitution for the "extraordinary" cost of boarding the animals for several months because two animal rescue organizations volunteered to care for the animals to save them from euthanization exceeded the its authority.

6. The superior court erred in entering Finding of Fact 13.

7. The superior court erred in entering Finding of Fact 21.

C. ISSUES PRESENTED FOR REVIEW

1. The prosecution charged Ms. Winger under a statute that proscribed acts that caused substantial physical pain to an animal over an "extended" period of time. But the charging document said the offense occurred on or about April 29, 2018, and did not give notice of facts establishing an extended period of time required to commit these charged negligent acts. Was the Information constitutionally defective for failing to allege an essential element of first degree animal cruelty?

2. A judge unilaterally amended the information from first degree animal cruelty to a second degree offense after the close of the state's evidence. This was constitutionally improper.

3. The evidence was insufficient to sustain the four first degree animal cruelty charges.

4. The prosecution is constitutionally mandated to disclose all material exculpatory or impeaching information in its possession. The prosecution did not disclose emails the chief of police had involving communication with a key witness that would have been material to impeach several witnesses. Did the prosecution violate its obligations under Brady and Due Process clause of the Fourteenth Amendment?

5. The Eighth Amendment to the United States Constitution prohibits the imposition of cruel and unusual punishment. Article I, section 14 provides greater protection in this area. Does a lifetime ban on possessing animals violate the constitutional prohibitions against cruel and unusual punishment?

6. The veterinarian who examined the animals recommended to euthanize them because the cost of caring for them was going to be very extraordinary. Two animal rescue organizations volunteered to spare no expense and to bear the extraordinary cost of caring for the animals to save them from euthanization. Did the trial court exceed it authority in imposing the extraordinary cost voluntarily assumed by these rescue organization upon the Wingers?

D. STATEMENT OF THE CASE

Ms. Thelma Winger is Black. Her husband, Paul, is white. In 2015, the couple bought a decent-sized property with a barn in Grapeview. The couple realized a life-long dream of owning an animal farm. Ms. Winger is a retired Navy veteran. CP 112 at 6. She suffers from depression, Post Traumatic Stress Disorder, seasonal depression, and anxiety. CP 112 at

6. Diet and exercise have helped her cope with her mental illnesses. CP 112 at 6. Having pets was also therapeutic for Ms. Winger.

The Charges

The day before the State filed charges against the Wingers, Jo Ridlon emailed the Mason County Chief of Police Ryan Spurling six times(from noon to 9 p.m.). Ex. 1-5; 1RP 442. The reason for the flurry of emails was to make sure the chief of police was informed about the story of Kissy, Ms. Winger's horse, that had gone viral on social media. Ex. 1. Ms. Ridlon warned Chief Spurling of a "s#*t storm" that was brewing on social media and that members of the community had Ms. Winger's address as it was publically available. Ex. 3 at 2. Mason County Equine had made 25+ posts and someone posted a picture of the Wingers and several pictures of Kissy the horse. Ex. 1.

On Saturday, April 28, 2018 at 12:26 p.m., Jo Ridlon wrote:

> Hi Chief Spurling ... I'm hoping you have heard of the horse issue that going on right now ... Horse is owned by a Thelma Winger of 771 E Krabbenhoft Rd, Grapeview, 99546. I have people ready and willing to I pick up and provide medical care needed ... My understanding is one of the deputies told them to get it help and things spiraled out of control.
> I have been told the horse is in danger of colic or a tummy of worms if not re-fed properly ... I will do what you request but right now you have a s#*t storm going on and obviously her address is out there. Again, I have transportation and foster for it.

Ex. 3, p. 2.

Ms. Ridlon told Chief Spurling that the Wingers "REFUSED FOOD AND MEDICAL CARE FOR KISSY(HORSE)." Ex. 1.

She urged Chief Spurling:

> We have transportation and a safe place to re-fed this horse and hopefully save Kissys life.
> . . . .

> Please, can we help this horse before it gets sick with colic or worms and dies ... It's pretty obvious this is cruelty/neglect. Letting an animal suffer is cruel.

Ex. 1.

On April 17, 2018, Deputy Byron Baty came to the Wingers's home to investigate an allegation of "animal mistreatment." 1RP 361.

When Deputy Baty saw a horse he thought appeared "malnourished and kind of possibly starving." 1RP 333. In one of the stalls Baty also saw a dog which to him appeared "real skinny and looked starving." RP 334. He did not specify whether the dog he saw on April 17, 2018 was Fred, Buddy, or Baby. Deputy Baty investigated with the "old animal control officer" and learned there were no prior animal cruelty complaints against the Wingers. 1RP 336. Deputy Baty did not file any charges.

Twelve days later, on April 29, 2018, Deputy Heather Prigger came knocking at the Winger home. 1RP 35. She claimed she had received another "complaint" about animal neglect at the Winger residence. 1RP 35. This time Deputy Heather Prigger responded. 1RP 35. Deputy Prigger believed the horse looked worse than it had looked from the pictures Deputy Baty took 12 days prior. 1RP 46-47.

Deputy Prigger left the Wingers's home but returned a short time later. 1RP 48. When she returned this time she saw a dog in a barn stall which to her looked emaciated. 1RP 48. But in front of the dog was a bowl of dry dog food and a bowl of water, albeit "cloudy." 1RP 48-49, 62. Deputy Prigger called detectives to the Winger residence and applied for and helped execute a search warrant. 1RP 54-55.

As she executed the search warrant, immediately inside the front door Deputy Prigger found two kennels with a dog in each and they looked "extremely emaciated." 1RP 56. Deputy Prigger could not recall at trial whether the dogs in the kennels had food in front of them. 1RP 63. Nor could one of the responding detectives. 1RP 77. There was a bag of dog food inside the residence and some dog food just outside the kennels doors. 1RP 107-08, 110, 134-35.

The officers called animal rescue workers to take custody of the animals. 1RP 57.

The State charged both Paul and Thelma Winger with six felony counts of first degree animal cruelty against: Fred the dog; Baby the dog; Buddy the dog; Kissy the horse; Pearl the cat; and "baby bird." CP 36-38. Additionally, it charged Mr. and Ms. Winger with two gross misdemeanor counts of second degree animal

cruelty against "Two Doves" and against "Three Turtles." CP 39-40.

The prosecution dismissed the second degree gross misdemeanor counts at the end of trial for lack of evidence. 1RP 543-52. After the close of the State's case-in-chief, the defense moved to dismiss several the first degree animal cruelty charges, including the charge concerning Pearl the cat, based on sufficiency of the evidence. 2RP 574. The court declined to dismiss any of the first degree animal cruelty charges and ruled sua sponte, it was "orally" amending down the first degree animal cruelty charge pertaining to Pearl the cat to second degree animal cruelty. 1RP 579; 624. This after the court acknowledged that the emaciated condition of Pearl the cat could have been caused by the chronic intestinal disease. 2RP 579.

At the bench trial, Ms. Winger conceded all instances of her failure to provide adequate nutrition for her animals amounted to second degree animal cruelty. 2RP 598-603. Her theory of defense was that the State did not prove she intentionally, knowingly, nor negligently starved or dehydrated her animals, she did not intentional withhold food from her animals as required for first-degree animal cruelty. 2RP 598-603.

Three years and twenty days after the alleged date of the offense, the Wingers were haled to court for a bench trial. The court found the Wingers guilty of four counts of first degree animal cruelty—for Kissy the horse, Fred the dog, Baby the dog, Buddy the dog. 1RP 592-94. It also found the Wingers guilty of one count of animal cruelty in the second degree for the cat. 1RP 592-94.

For all four first degree felony animal cruelty convictions, the superior court sentenced Ms Winger to 45-day sentences to run concurrently. CP 69-85; 1RP 639-41, 669-70. For the second degree gross misdemeanor animal cruelty conviction, it sentenced Ms. Winger to a 364-day sentence, with 319 days suspended. CP 69-85; 1RP 639-41, 669-70. The court also imposed $6,963.09 as restitution. CP 106-07; 1RP 686-89.

E. ARGUMENT

1. The Information is constitutionally deficient as it omits an essential durational element for each first degree animal cruelty charge.

Ms. Winger stands convicted of four counts of first degree animal cruelty. The State charged her by Information of knowingly starving, dehydrating, or suffocating five animals *on or about April 29, 2018*. *See* CP 63 at 11-12.

As charged, a person commits first degree animal cruelty if "[w]ith criminal negligence, [they] cause[] death or substantial and unjustifiable physical pain that extends for a period sufficient to cause considerable suffering…" RCW 16.52.205.

The Information alleged a time period "on or about" a single day and does not include any extended time period during which the charged negligent acts of starvation and dehydration allegedly occurred. CP 63. As a result, the trial court did not require the State to prove the charged negligent acts caused each animal substantial physical pain that "extended for a period" sufficient to cause considerable suffering as required by RCW 16.52.205.

The standards for adequacy of a charging document are determined under the Sixth Amendment to the United States Constitution, under article I,

section 22 of the Washington Constitution, and by CrR 2.1. Under the Sixth Amendment, an accused person in a criminal prosecution "shall enjoy the right ... to be informed of the nature and cause of the accusation." Article I, section 22 similarly authorizes "the right ... to demand the nature and cause of the accusation against him, to have a copy thereof." CrR 2.1(a) specifies that an information "shall be a plain, concise and definite written statement of the essential facts constituting the offense charged."

These standards have led to the "essential elements" rule used by Washington courts. *State v. Canela*, 199 Wn.2d 321, 328, 505 P.3d 1166 (2022). Under this rule, the information is constitutionally sufficient "only if all essential elements of a crime, statutory and nonstatutory, are included in the document." *State v. Johnson*, 180 Wn.2d 295,299,325

P.3d 135 (2014) (*quoting State v. Vangerpen*, 125 Wn.2d 782, 787, 888 P.2d 1177 (1995)). Essential elements of a crime are those "'necessary to establish the very illegality of the behavior charged.'" *Id.* (*quoting State v. Zillyette*, 178 Wn.2d 153, 158, 307 P.3d 712 (2013)). An accused person must be informed of the criminal charge he or she is to meet at trial and cannot be tried for an offense which has not been charged. *Vangerpen*, 125 Wn. 2d at 787.

Our appellate courts review allegations of constitutional violations—such as inadequate charging in an information—de novo. *State v. Siers*, 174 Wn.2d 269, 273-74, 274 P.3d 358 (2012). Since Ms. Winger raised this issue for the first time on appeal, this standard applies if the information lacked any essential elements or facts. *See Canela*, 199 Wn.2d at 328-29.

In *Kjorsvik*, the Supreme Court set out a two-pronged test for posttrial challenges to charging documents: "(1) [D]o the necessary facts appear in any form, or by fair construction can they be found, in the charging document; and, if so, (2) can the defendant show that he or she was nonetheless actually prejudiced by the inartful language which caused a lack of notice?" *State v. Kjorsvik*, 117 Wn.2d 93, 105-06, 812 P.2d 86 (1991).

As the Supreme Court recently explained in *Derri*, an information is constitutionally adequate under the federal and state constitutions "only if it sets forth all essential elements of the crime, statutory or otherwise, and the particular facts supporting them." *State v. Derri*, 511 P.3d 1267, 1285 (Wash. 2022) (*quoting State v. Hugdahl*, 195 Wn.2d 319, 324, 458 P.3d 760 (2020)). "Essential elements" are "the facts

that the State must prove beyond a reasonable doubt to establish that the defendant committed the charged crime." *Id.* (*quoting State v. Recuenco*, 163 Wn.2d 428, 434, 180 P.3d 1276 (2008)).

The main purpose of the essential elements rule "is to give notice to an accused of the nature of the crime that he or she must be prepared to defend against." *Kjorsvik*, 117 Wn.2d at 101. Statutes defining crimes "must be strictly construed." *State v. Shipp*, 93 Wn.2d 510, 515, 610 P.2d 1322 (1980). The requirements of due process and the importance of giving fair notice to the public demand that courts narrowly view the plain terms of a law penalizing certain conduct. *Id.*

To convict someone of first degree animal cruelty, the State has to alleged and prove the charged conduct

caused substantial physical pain that "extended for a period" sufficient to cause considerable suffering.

But, the Information omitted the duration requirement. The Information did not put Ms. Winger on notice of a specific " extended period of time" sufficient to cause considerable suffering to each animal.

a. The durational element that the negligent acts cause an animal substantial physical pain for an "extended" time period sufficient to cause considerable suffering is missing.

As charged, a person commits first degree animal cruelty if "[w]ith criminal negligence, [they] cause[] death or substantial and unjustifiable physical pain that extends for a period sufficient to cause considerable suffering…" RCW 16.52.205. The Information omits the causal link between the criminal conduct charged and the requirement that the negligent acts cause "physical pain that extends for a

period sufficient to cause considerable suffering" to the animal. *See* RCW 16.52.205

The State charged Ms. Winger with six counts of first degree animal cruelty as follows:

> That the said defendant, THELMA WINGER, in the County of Mason, State of Washington, ***on or about April 29, 2018***, did, with criminal negligence, starve, dehydrate, or suffocate an animal (to wit: a [Horse, pitbull 1, or pitbull 2 or pitbull 3 or cat] known as [Kissy, Fred, Baby, Buddy, Pearl], and/or [brief description of the animal]) and as a result caused death or substantial and unjustifiable physical pain that ***extended for a period*** sufficient to cause considerable suffering; contrary to RCW 16.52.205, and against the peace and dignity of the State of Washington.

CP 63 (emphasis added). The Information neglected to include a specific duration or extended period during which Ms. Winger allegedly committed the charged negligent acts or starvation and dehydration.

For example, in *Peterson,* the information alleged the negligent treatment occurred during an

extended period of 68 days from June 1 to September 9, 2009. *State v. Peterson*, 174 Wn. App. 828, 841, 301 P.3d 1060 (2013), *abrogated on other grounds by State v. Jallow*, 16 Wn. App. 2d 625, 482 P.3d 959 (2021). Similarly, in *Jallow*, the prosecution alleged the underlying conduct occurred within a 35-day period, specifying an extended time of 19th day of October, 2016, through on or about the 9th day of December, 2016. 16 Wn. App. 2d at 636.

Some definitions may be instructive. The word "substantial" as used in the statute means "'a degree of harm that is considerable and necessarily requires a showing greater than an injury merely having some existence.'" *State v. Loos*, 14 Wn. App. 2d 748, 766, 473 P.3d 1229 (2020) (*quoting State v. McKague*, 172 Wn.2d 802, 262 P.3d 1225 (2011)). It means "'considerable in amount, value, or worth.'" *Loos*, 14 Wn. App. 2d at 766

(*quoting* Webster's Third New International Dictionary 2280 (2002)).

Further, by requiring that the pain last long enough to cause "considerable suffering," the Legislature "clearly indicated a durational requirement." *Loos*, 14 Wn. App. 2d at 766. "The State must demonstrate that the amount of pain the [animal] victim experienced was considerable and the pain the victim experienced lasted for a significant period of time." *Id*.

Here, Ms. Winger went to trial preparing to defend against the charge that she was criminally negligent, and starved and/or dehydrated, several animals "on or about April 29, 2018." CP 63.

Without minimizing the harm to an animal, if arguendo, the Wingers neglected to feed Kissy the horse on or about April 29, 2018, that brief hunger and

thirst could not cause a 1,000 lbs horse to weigh 700 lbs as later alleged in closing by the prosecution. 2RP at 591. As another example, one day of hunger and starvation did not make Baby go down from his optimal weight of 66.2lbs to 42 lbs as alleged by the State. *See* 2RP at 588-89. One day of hunger and thirst is not the extended hunger and dehydration that causes an animal to suffer substantial pain extending for a period sufficient to cause considerable suffering.

The State's case-in-chief presented evidence of starvation and dehydration on or about April 29, 2018. At the close of the evidence, the State had not proved the hunger and thirst on or about April 29, 2018, extended for a significant period of time. *Loos*, 14 Wn. App. 2d at 767. The brief April 29, 2018 starvation or dehydration is not causally linked to any "substantial

and unjustifiable physical pain that extends for a period sufficient to cause considerable suffering."

The provision of the animal cruelty in the first degree under which the State prosecuted Ms. Winger, RCW 16.52.205(2) states:

> A person is guilty of animal cruelty in the first degree when, . . . , he or she, with criminal negligence, starves, dehydrates, or suffocates an animal, or exposes an animal to excessive heat or cold and as a result causes: (i) Substantial and unjustifiable physical pain that extends for a period sufficient to cause considerable suffering; or (ii) death.

Under this statute, the prosecution is required to prove the charged conduct—"starving" or "dehydrating"—caused substantial and unjustifiable physical pain to an animal that "extends for a period" sufficient to cause considerable suffering or death. RCW 16.52.205(2). There must be connective facts establishing a specific extended duration of time as an

element of the offense. But the State omitted the essential facts supporting this element in the charging document.

Moreover, in its case-in-chief, the State elicited from all its witnesses only the conduct that occurred on April 29, 2018. 1RP 54, 96, 111, 169, 422.

The State prosecuted the four first degree animal cruelty charges on the theory that all the charged conduct occurred on April 29, 2018. 1RP at 54. For instance, the State confined its questioning of Heather Prigger (1RP at 54); Jeffrey Rhoades (1RP at 96); Christopher Liles (1RP at 111); Jo Ridlon (1RP at 169), and Tina Whittemore (1RP at 422) to only the events of April 29, 2018.

Just before its closing argument, the prosecution reminded the court that to convict, it was required to prove Ms. Winger caused "substantial and unjustifiable

physical pain that extends for a period sufficient to cause considerable suffering." 2RP at 584.

But then in closing, the prosecution changed tact and argued for the first time: "[t]he facts of the case begin on April 17th, 2018" until on "April 29th, 2018." 2RP at 584-85. April 17, 2018 does not appear in the Information. CP 63. The State first mentioned April 17 in its summation for the four first degree animal cruelty offenses.

For count I, Fred the dog, the prosecution argued in closing, the charged negligent conduct occurred over *months* and then again that it took *over six months*. 2RP at 588. The prosecution argued it proved first degree animal cruelty as it pertains to Fred. It argued Fred was not only starved and dehydrated, but he suffered substantial and unjusfiable physical pain that extended a period sufficient to cause considerable

suffering: "it took *months* to get this animal into this condition. . . . That is a period of *over six months*." 2RP at 588(emphasis added).

For Count II, Baby the dog, the prosecution did not argued the starvation and dehydration happened over any specific time period. 2RP at 588-89. It only argued Baby was 42 lbs. on April 29, 2018 and finally got to an optimal weight of 66.2 lbs. on July 29, 2018. 2RP at 588-89.

For count III, Buddy the dog, the prosecution further argued: "And I would submit to the Court the Court can also find that Buddy suffered from dehydration, based upon the finding of a *week prior* that the dog was dehydrated." 2RP at 590(emphasis added.)

For count IV, Kissy the horse, the prosecution argued Kissy was observed on April 17, 2018 through

April 29, 2018 and Deputy Prigger indicated in testimony she had observed a substantial decrease of body fat, bad body weight and the physical condition of the horse had worsened in those *12 days*. 2RP at 591(emphasis added). On May 1, 2018, Dr. Macy Paden indicated the horse weighed 700 lbs. even though the optimal weight should have been 1,000 lbs. 2RP at 591. The prosecutor asked the court to conclude Kissy's physical pain had extended for a period of time sufficient to cause considerable suffering, based upon the amount of time that it would take for this animal to reach this level. 2RP at 592.

The court credited "notwithstanding" that Kissy the horse had "alfalfa" and all three dogs had dried dog food on April 29, 2018, all four animals were deprived of adequate food over "several months" or "many months" or even years. CP 106 at 3.

The written findings of fact and conclusions of law the superior court entered are instructive:

The court concluded that "On or about April 29, 2018, the Defendant had starved the dogs Fred, Buddy, and Baby, and the horse Kissy. CP 106.

Concerning all three dogs, the court entered the findings of fact 13:

> The emaciated condition of the dogs was caused by starvation due to inadequate feeding. The dogs had either not been provided any food or had not been provided adequate food for *several months prior* to April 29, 2018, notwithstanding the dry dog food seen on April 29, 2018.

CP 106 at 3(emphasis added).

The court surmised the starvation did not occur on April 29, 2018, but had happened over an unspecified period of months. CP 106.

Concerning Kissy the horse, the court entered the finding of fact 21:

> The emaciated condition of the horse Kissy was due to starvation caused by many months or years of neglect by not feeding it appropriately, notwithstanding the alfalfa seen on April 29, 2018.

Finding of Fact 21; CP 106 at 3.

The Information and trial centered around acts of neglect on or about April 29, 2018. The court credited "notwithstanding" that Kissy the horse had "alfalfa" and all three dogs had dried dog food on April 29, 2018, all four animals were deprived of adequate food over "several months" or "many months" or "even years." CP 106 at 3.

The prosecution charged Ms Winger with acts of neglect on or about April 29, 2018, yet the Court itself concluded the police found all animals had food available in front of them on that date. The prosecution did not specify the "extended" period of time that the statute requires to commit this offense. The court

entered findings that the offense occurred over "12-days," "many months," and even many "years," yet Ms. Winger was not on notice she would defending negligent acts over any specific time frame. CP 106 at 3.

The charging document failed to contain the critical facts—temporal element—underlying the essential elements of the charged crime.

b. Reversal to vacate all first degree animal cruelty convictions is required.

Ms. Winger was given notice that she was defending against negligent acts that happened on or about April 29, 2018. CP 63. And nothing else. The State centered it case-in-chief on negligent acts of starvation and dehydration that happened only on April 29, 2018. See 1RP at 54, 96, 111, 169.

And then at closing, for the first time in these proceedings, the State argued that it established the

offenses were committed over a period of 12 days. 2RP at 584-85. The essential time frame was an a key element that was not alleged in the information. Therefore all the first degree animal cruelty convictions must reversed and dismissed.

If an essential element is missing (first prong of *Kjorsvik*, 117 Wn.2d at 105-06) then prejudice is presumed and reversal is automatic.

2. The superior court committed reversible error when it, sua sponte, amended the Information concerning animal cruelty against Pearl the cat after the State rested its case from first degree to second degree.

Concerning Pearl the cat, the Information alleged a first degree animal cruelty charge. CP 63. After the State had rested its case-in-chief, the defense moved to dismiss several the first degree animal cruelty charges, including the charge concerning Pearl the cat, based on sufficiency of the evidence. 2RP 574.

The court concluded:

> The Court does believe that the State has not met its burden with regard to the animal cruelty in the first degree with regard to the cat, Pearl. The Court will allow the amendment of the information so that Count 5 is amended to animal cruelty in the second degree, as it relates to the cat, Pearl.

2RP 580.

The court declined to dismiss any of the first degree animal cruelty charges and unilaterally declared it was "orally" amending down the first degree animal cruelty charge pertaining to Pearl the cat to second degree animal cruelty. 1RP 579; 624.

Before the State presented its case, Ms. Winger was on notice she would be defending a first degree animal cruelty charge pertaining to Pearl the cat. After the State's case-in-chief failed to prove first degree animal cruelty pertaining to Pearl the cat, which is

why the judge sua sponte, "orally" amend the Information from first degree to second degree.

The main purpose of the essential elements rule "is to give notice to an accused of the nature of the crime that he or she must be prepared to defend against." *Kjorsvik*, 117 Wn.2d at 101. The ad hoc amendment of the Information by the trial court violated the notice as Ms. Winger went to trial prepared to defend against the first degree animal cruelty against Pearl the cat.

The trial court abused its discretion in amending the Information after the State rested its case-in-chief against the Wingers.

A criminal charge may not be amended after the State has rested its case-in-chief unless the amendment is to a lesser degree of the same charge or a lesser included offense. *State v. Pelkey*, 109 Wn. 2d

484, 491, 745 P.2d 854 (1987). Anything else is a violation of the defendant's article 1, section 22 right to demand the nature and cause of the accusation against him or her. *Pelkey*, 109 Wn. 2d at 491. Such a violation necessarily prejudices this substantial constitutional right. *Pelkey*, 109 Wn. 2d at 491. The trial court committed reversible error in permitting this mid-trial amendment. *Pelkey*, 109 Wn. 2d at 491. To permit the State to wait until resting its case to amend the information would allow fundamental unfairness to creep into the trial, and "our system of the administration of justice suffers when any accused is treated unfairly." *State v. Gehrke*, 193 Wn. 2d 1, 16, 434 P.3d 522 (2019) citing *Brady v. Maryland*, 373 U.S. 83, 87, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).

In the case of an untimely amendment to the information, the mandatory joinder rule requires

dismissal with prejudice of the charge in the late-filed amendment (unless the ends of justice exception applies). *Gehrke*, 193 Wn. 2d at 19–20 *citing State v. Dallas*, 126 Wn.2d 324, 327-28, 892 P.2d 1082 (1995). The Court must also dismiss with prejudice the second degree animal cruelty charge concerning Pearl the cat.

3. The State failed to prove beyond a reasonable doubt the acts of starvation and dehydration occuring on or about April 29, 2022 caused each animal substantial pain that extended for a period sufficient to cause considerable suffering.

The Fourteenth Amendment Due Process Clause requires the State prove each essential element of the crime charged beyond a reasonable doubt. *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000); *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). Evidence is sufficient only if, in the light most favorable to the prosecution, a rational trier of fact could have found

the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); *State v. Hummel*, 196 Wn. App. 329, 353, 383 P.3d 592, *review denied*, 187 Wn.2d 1021 (2016).

Where additional elements are added to the "to convict" instruction, and the State does not object, the additional element becomes the "law of the case" and must be proved beyond a reasonable doubt. *State v. Johnson*, 188 Wn.2d 742, 756, 399 P.3d 507 (2017). If the State failed to meet this burden with respect to the added element, the conviction must be dismissed. *Id.*

The State prosecuted five first degree animal cruelty charges on the theory that all the charged conduct occurred on or about April 29, 2018. 1RP at 54.

For example, In *Robertson*, the court concluded the evidence was sufficient to prove substantial pain

and considerable suffering because the State proved the victim suffered a headache that lasted more than two weeks, extensive bruising, and a black eye. *State v. Robertson*, 88 Wn. App. 836, 841, 947 P.3d 765 (1997) (*cited with approval in State v. Loos*, 14 Wn. App. 2d 748, 766-67, 473 P.3d 1229 (2020)).

In *Peterson*, 174 Wn. App. at 853, the evidence showed that *throughout the summer of 2009*, the horses at issue often did not have water to drink. An average horse needs to drink between 6 and 10 gallons of water a day. Borchardt testified that when Peterson leased his field, the horses were frequently without any water, even on very hot days.

By contrast, in *Loos*, the court concluded the evidence was not sufficient because a child suffered only brief physical pain and the State presented no

evidence to show any pain he experienced lasted for a significant period of time. *Loos*, 14 Wn. App. 2d at 767.

The State's case-in-chief only elicited acts on or about April 29, 2018. For instance, the State confined its questioning of Heather Prigger (1RP at 54); Jeffrey Rhoades (1RP at 96); Christopher Liles (1RP at 111); Jo Ridlon (1RP at 169), and Tina Whittemore (1RP at 422) to only the events of April 29, 2018. All reasonable evidence drawn in favor of the state establish that the Ms. Winger negligently failed to feed or care for her animals on April 29, 2018. This acting alone does not establ

For Count II, Baby the dog, the prosecution did not argued the starvation and dehydration happened over any *specific time period*. 2RP at 588-89. It only argued Baby was 42 lbs. on April 29, 2018 and finally got to an optimal weight of 66.2 lbs. on July 29, 2018.

2RP at 588-89. The summation of the evidence did not prove Baby the dog suffered for an extended period of time.

For count I, Fred the dog, the prosecution argued in closing the charged conduct occurred over months and then specified it took over *six* months. 2RP at 588 (emphasis added). The prosecution argued it proved first degree animal cruelty as it pertains to Fred because he was not only starved and dehydrated, but he suffered substantial and unjusfiable physical pain that extended a period sufficient to cause considerable suffering: "This goes along because it took *months* to get this animal into this condition. . . . That is a period of *over six months*" 2RP at 588 (emphasis added). The State presented evidence of Fred not receiving food on April 29, 2018 and then incorrectly argued Fred was

starved for *over six months*. Prosecution's argument is not evidence.

For count III, Buddy the dog, the prosecution further argued: "And I would submit to the Court the Court can also find that Buddy suffered from dehydration, based upon the finding of a *week* prior that the dog was dehydrated." 2RP at 590 (emphasis added). The State's theory of the case was that Buddy was starved and dehydrated on April 29, 2018. But in closing, it incorrectly argued Buddy was dehydrated a "*week prior*." From this summation the negligent acts occurring on April 29, 2018 could not have cause buddy to suffer "a *week* prior."

Sufficiency as to the Three Dogs

Concerning all three dogs, the court entered the findings of fact 13: "The dogs had either not been provided any food or had not been provided adequate

food for several months prior to April 29, 2018, notwithstanding the dry dog food seen on April 29, 2018." CP 106. The evidence was insufficient to establish finding of fact 13, no witness testified to specifically seeing the condition of Fred, Buddy, or Baby on April 17 and again on April 29, 2018. The State's case-in-chief focused on acts of neglect occurring or about April 29, 2018. The finding of fact 13, that the three dogs had not been provided any food for *several months* prior to April 2018 was not supported by sufficient evidence in the record, given the crimes as charged and tried in the State's case-in-chief. CP 106.

Sufficiency as to Kissy

For count IV, Kissy the horse, the prosecution argued Kissy was observed on April 17, 2018 through April 29, 2018 and Deputy Prigger indicated in testimony she had observed a substantial decrease of

body fat, bad body weight and the physical condition of the horse had worsened in those *12 days*. 2RP at 591 (emphasis added).

The prosecution was for negligent act that happened on or about April 29, 2018. In closing, now the prosecution argued it proved the negligent acts of starvation and dehydration happened between April 17, 2018 to April 29, 2018. Worse of all, the court held that Wingers' negligent starvation of Kissy did not occur on April 29, 2018, but had happened over an unspecified period of *many months or many years*:

> The emaciated condition of the horse Kissy was due to starvation caused by *many months or years* of neglect by not feeding it appropriately, notwithstanding the alfalfa seen on April 29, 2018.

Finding of Fact 21; CP 106 at 3 (emphasis added). Concerning Kissy the horse, the evidence in the record

was insufficient to support finding of fact 21 as entered by the court.

Here, there is no direct connective evidence—a causal link—between the negligent acts of starvation and dehydration that occurred on or about April 29, 2018 and "substantial" physical pain that extends for a period sufficient to cause considerable suffering. The State presented no evidence to show any pain each suffered was more than momentary on or about April 29, 2018. The State did not demonstrate that the conduct of starvation and dehydration that occurred on or about April 29, 2018, caused Fred the dog, Buddy the dog, Baby the dog, and Kissy the horse, pain that was "considerable" or that "lasted for a significant period of time." *Loos*, 14 Wn. App. 2d at 766.

Even taking the evidence in the light most favorable to the State, the record does not contain

sufficient non-speculative evidence of this core durational element for each first degree animal cruelty offense. All first degree animal cruelty convictions must be reversed and the charges dismissed. *State v. Hummel*, 196 Wn. App. 329, 359, 383 P.3d 592 (2016).

4. The prosecution withheld material impeachment evidence, this violated its constitutional obligations under *Brady v. Maryland* and deprived Ms. Winger of due process guaranteed by the Fourteenth Amendment.

The prosecution has a duty to seek out exculpatory and impeaching evidence held by other government actors, and the failure to do so violates the defendant's right to due process. U.S. Const. amend. XIV; *Kyles v. Whitley*, 514 U.S. 419, 438, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995); *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963); *State v. Davila*, 184 Wn.2d 55, 71, 357 P.3d 636 (2015).

A so-called "Brady violation" occurs where (1) the evidence is favorable to the accused, either because it is exculpatory or because it is impeaching, (2) the evidence is suppressed by the State, either willfully or inadvertently, and (3) the evidence is material, i.e., prejudicial. *Davila*, 184 Wn.2d at 69; *United States v. Price*, 566 F.3d 900, 907 & 911 n.12 (9th Cir. 2009).

a. *The evidence was Material and exculpatory*.

The founding director of United Angels, Jo Ridlon, testified at trial how she got involved with the Wingers and their animals in 2018. 1RP 137-57. According to Ridlon, George Blush, who runs a food pantry for those in need of food, had concerns about the Wingers' animals and spoke with Paul over the phone a few days before April 29, 2018 about the horse. 1RP 154-55.

She asked Paul whether the horse was on a "refeeding schedule" and offered to bring a veterinarian out to assess the horse. 1RP 152. Ridlon claimed Paul told her Kissy the horse had a refeeding schedule and would not take up the offer of veterinary services. 1RP 152-53. When asked how she could remember this three years after-the-fact, Ridlon replied she had "memorialized" it in an email between herself and "Chief Sperling [sic] ." 1RP 155.

The following day, Ridlon provided a copy of the email she had mentioned the day before to the prosecution, who provided it to the defense. The defense was surprised it was learning for the first time through Ridlon's testimony that Chief Spurling had records that should have been turned over to the defense during pretrial discovery. The defense asserted the failure to do so constituted a "Brady

violation" that warranted dismissal of the first degree animal cruelty charges involving the dogs. 1RP 161-65.

The defense noted Ridlon's emails to Chief Spurling were sent on April 28, 2018, and that they informed Chief Spurling, "George [Blush] said when he delivered dog food to [the Wingers], there were several things that didn't seem right, but he didn't say anything." 1RP 162. The defense also noted it was unaware of these email communications until Ridlon testified about them. 1RP 165.

The defense explained the primary allegation in was that the couple starved their animals by not feeding them. 1RP 161. The couple told their attorney that Mr. George Blush at 5XL shop had provided them with dog food and could corroborate their account. 1RP 161-62. But when George Blush realized the investigator was working for the defense he said he

had not provided food and asked the investigator to get out of his store. 1RP 161-62. The defense could not pursue anything further with George Blush. 1RP 161-62.

The evidence from George Blush that Wingers were providing food to the dogs was a "central" to the accusation that the Wingers were starving the three dogs and whether the couple was guilty of first degree animal cruelty as to three dogs turned on this evidence. 1RP 162-63. This crucial evidence had been in possession of local law enforcement for over three years and the prosecution had failed to turn it over to the defense. 1RP 162-63. Ms. Winger's counsel argued evidence the Wingers were receiving dog food for their dogs was exculpatory evidence that should have been disclosed and therefore dismissal was warranted due to

a *Brady* violation. 1RP 163, 193. Paul's counsel joined in the motion. 1RP 163-65.

The prosecution gave the court a copy of the emails Ridlon turned over during the trial. 1RP 168. The court opined that the emails provided did not make it clear whether Chief Spurling ever actually received them. 1RP 173. The prosecutor agreed, stating:

> There's no indication that that email actually was sent to Chief Sperling[sic]. When it's printed there is the belief that it could be, but and then I guess I'll just show this to defense how it's printed off on mine. So, this appears where it's from. It almost appears as if she sent this email to herself.

1RP 174.

The defense responded by noting these emails were what the witness just provided during trial and did not come from the police.. 1RP 176-78. The court agreed the current record was incomplete and directed

the prosecutor to obtain all relevant emails from local law enforcement. CP 46-47;1RP 193-94.

The prosecutor subsequently updated the court and the defense about his efforts to obtain any and all law enforcement emails involving the Wingers.. 2RP 2-5. The prosecutor noted emails are only retained by the Sheriff's office for two years and therefore it was "likely information from 2018 may be compromised by retention." 2RP 3. The prosecutor informed the court that none of the emails previously provided by Ridlon could be found in the Mason County Sheriff's email system. 2RP 4. The prosecutor concluded his updates as follows:

> In addition, there is still the one issue of the one e-mail in which it starts off at the bottom where Ms. Ridlon e-mailed Chief Spurling. Ms. Ridlon, it then looks - appears she replied again to her own message in addition, and then Chief Spurling did respond and then there appears to be two other responses, and then

> the final one, which counsel is basing their argument on, there still is the issue where it's from and to the same individual. I have no knowledge or information regarding whether or not Chief Spurling actually received that e-mail, if that e-mail was sent to him or not, as it was not found in the order to compel, in the diligent search of his e-mail records. So, I think that gets us up to speed to where we're at right now.

2RP 4-5.

The defense noted that because Mason County Sheriff's office had a two-year email retention policy, it may not be possible to retrieve the email exchange between Ms. Ridlon and Chief Spurling that happened in April 2018, over three years prior to the beginning of trial in May 2021. 2RP 5-6. The defense also noted the prosecution turned over emails from 2019 and 2020 but they were not relevant to the present prosecution. 2RP 6-7.

The trial orally denied the defense's *Brady* motions. 1RP 220-28. The trial court found there was

no basis beyond speculation to conclude Chief Spurling ever received the email Ridlon claimed she sent him. 1RP 224-27. The court concluded the defense failed to meet its burden to show the State was ever in possession of exculpatory evidence and denied both motions. 1RP 224-27.

b. Refusing to reach the merits of the defense's Brady Claim was reversible error.

The court erroneously faulted the defense for failing to prove Jo Ridlon's emails were received by the State or even sent to Chief Spurling:

> But I want it to be clear. At this juncture, the Court's denial is not based upon an analysis of the merits of the [*Brady*] argument, but it's based upon the failure of defendants to prove that the information was received by the State or even sent by Ms. Ridlon.

1RP 226.

A close review of the email exchange tendered to the prosecution by Ms. Ridlon, proves they self-authenticate. The emails clearly show Ms. Ridlon emailed Chief Spurling to apprise him of the Winger horse. The content of that all these emails makes clear Ms. Ridlon and Chief Spurling were exchanging vital information about this case.

The facts within Ms. Ridlon's six emails on April 28, 2018 were circumstantial evidence that Chief Spurling received and responded to them. In her emails Ms. Ridlon urged the head of police in Mason County Chief Spurling: "Please can we help Kissy live?" and "Please, can we help this horse before it gets sick with colic or worms and dies ... It's pretty obvious this is cruelty/neglect. Letting an animal suffer is cruel." Ex. 1; Ex. 2. The next day, April 29, 2018, Mason County police came to the Winger residence to

investigate "animal mistreatment." The emails were an important evidence to explain that these charges came about due to public opprobrium of the Wingers on social media. Chief Spurling's response to one of the emails is also evidence that he received these emails and acted by sending his officer to investigate the very next day after receiving the emails.

Ms. Ridlon turned over her email exchange with Chief Spurling to the prosecution. The prosecution introduced it into evidence as State's Exhibit 1 through 5. 1RP 252-258. The court reviewed these exhibits before denying the defense motion to dismiss for a Brady violation. 1RP 252-258.

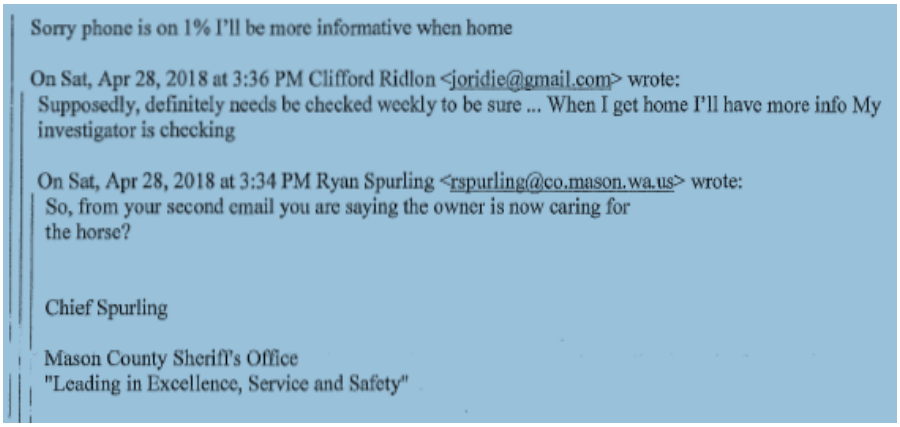
In Exhibit 1 and 3, Ridlon emailed Chief Spurling to make him aware there was "s#*t storm" brewing on social media concerning the poor condition

of Ms. Wingers' horse and she urged: "[p]lease can we help Kissy live?" See RP 252 ; Ex. 1.

In Exhibit 2, Ms. Ridlon emailed Chief Spurling on Saturday, April 28, 2018, at 8:06. 1RP198; Appendix at Ex. 2. Ms. Ridlon claims she heard from Paul about a refeeding program for Kissy the horse but she was did not believe such a program existed. Ms. Ridlon then volunteers to take over the care of Kissy the horse. Ms. Ridlon also forwards her previous email communication with "Juliua Stroup" on April 28, 2018, about the change in the horse's appearance since September 2017. 1RP at 253; Ex. 2

Exhibit 3 begins with the email between Ridlon and Chief Spurling sent at April 28, 2018, at 12:26 p.m. contained in Exhibit 1. Ms. Ridlon explains to Chief Spurling when she talked with Paul he explained the horse was on a feeding program "per Mason Co

equestrians." Chief Spurling responded from his email rspurling@co.mason.wa.us at 3:34 p.m: "So, from your second email you are saying the owner is now caring for the horse?" :



Sorry phone is on 1% I'll be more informative when home

On Sat, Apr 28, 2018 at 3:36 PM Clifford Ridlon <joridie@gmail.com> wrote:
Supposedly, definitely needs be checked weekly to be sure ... When I get home I'll have more info My investigator is checking

On Sat, Apr 28, 2018 at 3:34 PM Ryan Spurling <rspurling@co.mason.wa.us> wrote:
So, from your second email you are saying the owner is now caring for the horse?

Chief Spurling

Mason County Sheriff's Office
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RP 255; Exh. 3.

An appellate court reviews a *Brady* claim de novo. *Price*, 566 F.3d at 907. The specific question of materiality, or prejudice, is also reviewed de novo. *Davila*, 184 Wn.2d at 74. Evidence is material and its suppression prejudicial if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been

different. *Davila*, 184 Wn.2d at 73. A defendant need not show by a preponderance of the evidence that he would have been acquitted had the evidence been disclosed. *Id*. A "reasonable probability" is merely a probability sufficient to undermine confidence in the outcome. *Id*. The suppressed emails were material. There is a reasonable probability Paul and Thelma Winger would have demonstrated they did not have the mental culpability of criminal negligence and thus not be found guilty of the four counts of first degree animal cruelty. The suppressed emails were vital impeachment evidence, it appears the charges were filed because Ms. Ridlon's multiple email complaints pressured Mason police to act. Ms. Ridlon was also the State's central/key witness at trial. Before she took the stand, other witnesses, Heather Prigger, Jeffrey Rhoades and Christopher Liles had testified. They

could not be questioned about what precipitated the charges agains the Wingers. Moreover, if the defense could have impeached Ms. Ridlon on her bias and inconsistencies of whether animals had access to food there is a reasonable probability of a different result.

Price is instructive. There, the State negligently withheld information about the star witness's convictions for illegally altering her licensing plates, her three arrests on suspicion of theft, and a report of "theft by deception." *Price*, 566 F.3d at 912. This impeachment evidence would have been helpful to the defense, because the witness testified she saw the defendant with a gun minutes before he entered a vehicle that was later stopped by police. *Id*. at 902, 904.

Similarly to *Price*, the proseuctions case relied on witnesses who testified they believed the three dogs were not fed on or about April 29, 2018. *Id*. at 904. The

court's *Brady* ruling deprived the defense of vital impeachment evidence that was material and its suppression prejudiced Ms. Winger's right to a fair trial. There was a reasonable probability the result would have been different if the evidence had been disclosed, because the witness in question was the government's "star witness" and "impeachment evidence is especially likely to be material when it impugns the testimony of a witness who is critical to the prosecution's case." *Id.* at 914 (internal citations omitted).

The same is true here. Ms. Ridlon was unquestionably the State's "star witness." On April 28, 2018, before Mason County filed charges against the Wingers, she emailed Chief Spurling six times begging him to do something about Kissy the horse, who she believed faced imminent death. See 1RP 203-04, Ex. 1-

5. The next day a Mason County officer investigated this complaint. Ms. Ridlon's emails were material to explain how the charges came about and for their impeachment value, as Ms. Ridlon implored the police to act:

> Please can we help Kissy live?

Exh. 2.

> Please, can we help this horse before it gets sick with colic or worms and dies ... It's pretty obvious this is cruelty/neglect. Letting an animal suffer is cruel.

Exh. 3.

Just the day after Chief Spurling received six emails from Ms. Ridlon, an officer came unannounced to the Winger residence to investigate complaints of animal mistreatment. The Information charged the Wingers with neglect—that a horse,dogs, and a cat were starving or dehydrated on or about April 29, 2018. The defense's theory of defense was that all five animals were getting fed on or about April 29, 2018

because Kissy had alfalfa and George Shelton had recently delivered dried dog food for all three dogs, and the cat was fed but her poor condition was due to feline illnesses. See CP 106. In Ms. Ridlon's email to Chief Spurling, she indicated George Shelton the head of 5XL Shelton had delivered dog food to the Winger residence around the date of the charges: "George said when he delivered dog food to them there were several things that didn't seem right but he didn't say anything." Ex. 3. The illegal withholding of evidence denied the defense substantive and vital impeachment evidence as it prepared for the case. Which may explain why the defense did not present its own witnesses.

The illegal suppression undermines confidence in the outcome of this trial. The Court should reverse and remand for a new trial.

5. The mandatory forfeiture of all animals and a lifetime ban on owning any animals is cruel and unusual punishment under Article I, Section 14.

It has been Ms. Winger's life-long dream to own animals. It was therapeutic for her, a retired Navy veteran who has mental illness to have the companionship of her animals.

In *United States v. Littlefield*, 821 F.2d 1365, 1368 (9th Cir. 1987), the Ninth Circuit ruled excessive forfeiture as a sanction violates the Eighth Amendment. In that case, the defendant was charged with cultivating and possessing with intent to distribute over 700 marijuana plants. *Id*. at 1366. The government sought forfeiture of all of Littlefield's right, title and interest in a 40-acre parcel of property where the marijuana was grown under 21 U.S.C. § 853(a). *Id*. Littlefield argued that the statute should be construed

to authorize forfeiture of only the portion of the land used to cultivate the marijuana. *Id*. The district court agreed, ruling the statute authorized the forfeiture of only the portions of property actually used to commit the commission of the felony, and noted that a broader interpretation of the statute "would run the danger of violating the Eighth Amendment['s] prohibition against disproportionate punishments. *Id*. The government appealed. *Id*.

The Ninth Circuit Court of Appeals ruled that criminal forfeiture is a form of punishment and subject to Eighth Amendment's prohibition against disproportionate punishments.

The Court remanded the case back to the district court to determine whether forfeiture of the entire property together with other punishments imposed is not so disproportionate to the committed offense as to

violate the Constitution. *Id*. The Court directed the district court to consider the factors stated in *Busher* as well as any other relevant considerations, "including the value of the illegal drugs cultivated on the property, and the nexus between the portion of the property actually used to grow the marijuana plants and the rest of the land." *Id*.

a. *In light of the Fain factors, the forfeiture of Ms. Winger's animals and a lifetime ban on owning animals was unconstitutionally disproportionate.*

An evaluation of all relevant factors demonstrates that the forced forteiture of all of Ms. Winger's animals and the lifetime ban on having animals is excessive in violation of both the Eighth Amendment and our Washington's prohibition on excessive punishment.

RCW 16.52.200(4)(b) states:

> Any person convicted of animal cruelty shall be prohibited from owning, caring for, possessing, or residing with any animals for a period of time as follows:
>
> . . . .
>
> (b) Permanently for a first conviction of animal cruelty in the first degree under RCW 16.52.205.

In *State v. Fain*, this Court set forth four factors to consider in deciding if a sentence is proportional under article I, section 14: (1) the nature of the offense; (2) the legislative purpose behind the sentencing statute; (3) the punishment imposed in other jurisdictions for the same offense; and (4) the punishment imposed for other offenses in the same jurisdiction. 94 Wn.2d 387, 397, 617 P.2d 720 (1980).

Fain and federal constitutional cases predating *Fain* focused on the requirement that punishment be proportional to the offense. But as discussed, later Eighth Amendment cases emphasize that punishment must also be proportional to the defendant. *See*

Thompson v. Oklahoma, 487 U.S. 815, 834, 108 S. Ct. 2687, 101 L. Ed. 2d 702 (1988) (invalidating death penalty for children under 16 and stating "punishment should be directly related to the personal culpability of the criminal defendant"); *Miller v. Alabama*, 567 U.S. 460, 479-80, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012) (barring life without parole for all juveniles except "the rare juvenile offender whose crime reflects irreparable corruption").

It takes only one conviction of animal cruelty in the first degree to receive a lifetime prohibition from owning, caring for, possessing any animals with no judicial discretion whether or not to impose it. The mandatory deprivation of an animal for life is an excessive sanction and is cruel and unusual punishment.

Under the first *Fain* factor, analyzing the nature of the offense, Ms. Winger wanted to continue caring for these animals but for her indigency. She was convicted of acts of neglect and not causing intentional harm to her animals. Under the second *Fain* factor, the legislative purpose seems unclear, but the statute at issue does not seem to contemplate a person like Ms. Winger who fell on hard times and unintentionally neglected to care for her animals. The purpose of the prohibit statutes seems to be to protect animals from repeat animal cruelty offenders.

The legislative intent behind SB 5402, which increased the mandatory prohibition on animal ownership from two years to permanently, was to ensure future mistreatment of animals would not occur for repeat offenders:

> Prosecutors and law enforcement have come together to investigate and prosecute

> animal cruelty cases under the current laws. However, the current laws lack teeth. People are allowed to mistreat animals time and again because the penalties involved are not severe enough. Right now, those who are convicted of killing or severely abusing animals are only prohibited from owning a like animal for a period of two years. Current law does not prohibit these offenders from owning other animals even though they are likely to mistreat them as well. This bill prohibits offenders, who intentionally or with gross negligence mistreat animals, from ever owning similar, and in some cases non-similar, animals again. It strengthens the guidelines for repeat offenders. The bill does not penalize the citizen who unintentionally mistreats an animal. These offenders are given plenty of chances, including warnings, prior to prosecution. This type of penalty sends a message to offenders. Many other states have already passed more stringent penalties for animal mistreatment and Washington should follow suit.

WA B. Rep., 2010 Reg. Sess. S.B. 5402 at 2. Thus in 2010, the Legislature made amendments to allow a permanent deprivation of the target animal(s) rather

than two years, but still allowed the court judicial discretionary to impose or not impose the ban.

In 2011, the statute was amended again under 2011 SSB 5065 and HB 1147. The legislature amended the statute so a person convicted of first degree animal cruelty is prohibited from ever owning, caring for, or residing with any similar animals again. The new statute gave the sentencing court no discretion, forcing the court to order a person convicted of first degree animal cruelty to forfeit any similar animal or future similar animal permanently.

It appears from WA B. Rep., 2010 Reg. Sess. S.B. 5402 at 2, the legislative intent was not to penalize the citizen who unwittingly commit acts of neglect like Ms. Winger. Importantly, unintended neglect was a first offense. The legislative scheme has always given first time offenders plenty of chances, including warnings,

prior to prosecution. A lifetime ban seems an extreme penalty under the circumstances of this case.

Under the third *Fain* factor, Washington's lifetime ban is more extreme than almost any state in the nations.

In many other jurisdictions, Ms. Winger's offense would be considered a misdemeanor and not impose any penalty of permanent loss of any pet for life.

For instance, in Alaska, AS 11.61.140(f) makes animal cruelty a class A misdemeanor and gives the court discretion to prohibit or limit a defendant's ownership, possession or custody of animals up to 10 years.

In Arkansas, cruelty to animals is a Class A misdemeanor and is punishable with a fine of up to $1,000, imprisonment for up to a year, and no mention of deprivation of a pet.

In California, Cal. Penal Code § 597 makes killing an animal a felony, but the punishment includes no mandatory permanent deprivation of possessing an animal.

In Colorado, CRS 18-9-202(1)(b) a person is guilty of aggravated animal cruelty if he or she "needlessly kills an animal." But forfeiture of a pet is not included as punishment. Colo. Rev. Stat. § 18-9-202 (V.5). The court must enter an order prohibiting the defendant from owning, possessing, or caring for a pet animal for a period of 3 to 5 years, "unless the defendant's treatment provider makes a specific recommendation not to impose the ban and the court agrees with the recommendation."

In Connecticut, Chapter 945, Section 53-247, states a person who kills an animal "shall be fined not more than five thousand dollars or imprisoned not

more than five years or both," yet no deprivation of a pet is mentioned.

In Florida, there are two types of animal cruelty, (1) misdemeanor animal cruelty and (2) felony animal cruelty. Misdemeanor animal cruelty involves an isolated event, while felony animal cruelty is ongoing pain and suffering. Florida Statute Title XLVI § 828 provides that it is a misdemeanor to unnecessarily kill any animal. It only becomes a felony when actions were taken repeatedly. The punishment for killing an animal the first time is punishable to 365 days in jail. Nowhere does it mention lifetime deprevation of pets.

In Oregon, ORS 167.332(1)(a), a person is prohibited from possessing any animal of the same genus against which the crime was committed or any domestic animal for a period of five years following the entry of conviction. For animal abuse in the first

degree, there would be a mandatory 5-year prohibition of possessing a domestic animal.

In Illinois, a person convicted of aggravated cruelty, a person must forfeit the animal that is the basis of the conviction 510 ILCS 70/3.04, but no mention is made of a ban on an animal like Ms. Winger that was not the basis of the conviction.

The only state with a ban even nearly as harsh as Washington is Maine, where a court has discretion to ban a person from owning, possessing or having an animal on the defendant's premises "for a period of time that the court determines to be reasonable, up to and including permanent relinquishment." 17 M.R.S.A. § 1031(3-b)(D)(1). [1]

---

[1] Undersigned counsel's extensive research has not uncovered any state legislation that has a permanent ban on pet ownership for a first time offender with no judicial discretion or opportunity for rehabilitation.

Washington's mandatory sentencing provision that orders forfeiture of all animals permanently and prevents Ms. Winger from ever owning a similar animal at any date in the future is the most strict and excessive penalty in the United States.

Under the Fourth *Fain* factor, analysing punishments imposed for other offenses in Washington, it might be instructive to compare the lifetime ban on having a pet with the lifetime ban on possessing a firearm.

For firearm possession, if a person is convicted of a Class A felony or a sex offense, the individual will never be eligible to restore his gun right in Washington. RCW 9.41.040 (prohibiting persons convicted of "any serious offense," or any felony or misdemeanor of domestic violence from possessing a firearm.) But otherwise, a person may petition the

court for restoration of the right to possess a firearm. An individual is eligible for restoration by the executive through pardon, annulment, a certificate of rehabilitation, or equivalent finding of rehabilitation.

Unless an individual is convicted of a Class A or sex offense, individuals are eligible for restoration by a court following a period of 3-5 years without conviction or pending charges. *State v. Swanson*, 116 Wn.App. 67, 65 P.3d 343 (2003).

The prohibition on owning a firearm is to ensure that a convicted individual does not own a firearm as prophylactic protections for the general public. But taking away a pet dog or pet horse or pet cat, that was not the target of any cruelty is disproportionate. A person could never ever even petition the court for restoration of the right. The Court should hold that Ms. Winger's lifetime prohibition on owning animals is

disproportionate in light of the established *Fain* factors.

b. *As applied, the lifetime prohibition on owning pets is categorically unconstitutional under* Bassett *because it is contrary to national concessus, it is disproportionate to Ms. Winger's culpability and in consistent with legitimate penological goals.*

This Court could alternatively reverse the sentence under the categorical-bar analysis of *State v. Bassett*, 192 Wn.2d 67, 82-84, 428 P.3d 343 (2018). The *Bassett* Court explained that a categorical-bar analysis is appropriate for addressing cruel punishment claims based on either the nature of the offense or the characteristics of the offender. *Id*. at 84.

Under the categorical-bar framework, a court asks: (1) whether there is a national consensus against the sentencing practice at issue, "as expressed in legislative enactments and state practice," *Bassett*, 192

Wn.2d at 85, and (2) whether, in the court's independent judgment, the severity of the punishment is proportionate to the culpability of the offenders and whether the sentencing practice "serves legitimate penological goals." *Id*. at 87 (*quoting Graham v. Florida*, 560 U.S. 48, 67, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010)).

This Court applies a "categorical bar analysis" to determine whether a given sentence is categorically unconstitutional under Article I, aection 14 for a particular class of first time animal cruelty offenders such as Ms. Winger. *Bassett*, 192 Wn.2d at 82-84.

In *Bassett*, the Court held our state provision is more protective than the Eighth Amendment and categorically bars a sentence of life without parole for juvenile offenders regardless of their crimes. *Id*. at 85-90.

Applying these principles here, this Court should similarly hold Article I, section 14 categorically bars a lifetime ban on Ms. Winger who due to financial hardship unwittingly committed acts of neglect. The statute strips the superior court of its discretion to impose an carefully tailored restriction on owning animals that reflects inadvertence, poverty, and the fact that this was a first time offense. CP 20. It offers no opportunity for rehabilitation, even when pet ownership is a lifesaving avenue for needed therapy.

As applied, Ms Winger's mandatory lifetime ban on owning animals is disproportional under article I, section 14, as well as the Eigth Amendment. (some summary should be given here because this is a long section).

6. Cumulative error deprived Ms. Winger a fair hearing.

A person's right to reasonable notice of a charge against him, and an opportunity to be heard in his defense—a right to his day in court—are basic in our system of jurisprudence; and these rights include, as a minimum, a right to examine the witnesses against him, to offer testimony, and to be represented by counsel. *Chambers v. Mississippi*, 410 U.S. 284, 294, 93 S. Ct. 1038, 1045, 35 L. Ed. 2d 297 (1973).

A combination of errors may deprive a person of their due process right to a fair trial, even where the error viewed in isolation is harmless. *Chambers*, 410 U.S. at 289. The cumulative error doctrine applies in all proceedings. *Rookstool v. Eaton*, 12 Wn. App. 2d 301, 310, 457 P.3d 1144 (2020).

"Any trial can be made unfair by a series of errors that, individually, might not justify granting a new

trial, but that cumulatively did wrongly affect the verdict." *Id*.

If the court finds any of these errors were harmless, any combination of them cumulatively deprived Ms. Winger a fair hearing. Reversal of all charges is the appropriate remedy.

7. The trial court restitution order exceeds its authority.

A court's authority to impose restitution is limited to only that provided by statute. *State v. Moen*, 129 Wn.2d 535, 543-44, 919 P.3d 69 (1996). The relevant statute, RCW 9.94A.753(3); limits restitution to "easily ascertainable damages" caused by the person's action. *State v. Grffith*, 164 Wn.2d 960, 965-66, 195 P.3d 506 (2008).

Where a person is convicted of animal cruelty RCW 16.52.200(6) permits the court to order the

person to pay the reasonable cost "care, euthanization, or adoption."

The State requested restitution of $3,727.09 on behalf of Pasado's Safe Haven for the care of three dogs and the cat. 2RP at 732; CP 129. It also requested $3,236 on behalf of Pony Up Rescue for the care of the horse. 2RP 731-32; CP 129. The parties both agreed that the veterinarian who examined the three dogs and the cat recommended to euthanize them because the cost of caring for them was going to be so very extraordinary. 2RP 734. The defense pointed out that on learning the animals would be euthanized Pasado's Safe Haven stepped in saying they would spare no expense to care for these animals: "we don't care, we'll fund the cost, we volunteer to do that so that these animals don't have to be euthanized." 2RP 734. Therefore the court would be requiring the Wingers to

pay an "extraordinary" cost while the veterinarian established the reasonable cost was euthanization expenses only. 2RP 735. The defense argued the Wingers were responsible for reasonable costs and not the additional extraordinary costs of boarding these animals for several months. 2RP 735. Over, the Wingers' well-made objections, the court awarded Pasado's Safe Haven and Pony Up Rescue the requested $6,963.09 as total restitution. CP 106-07; 1RP 686-89.

Given the veterinarian's recommendation, there was no basis to board dogs for 1 to 3 months. That voluntary decision by a third-party was not a foreseeable outcome of the alleged crimes. Nor is it a reasonable cost attributable to Ms. Winger's acts. Ms. Winger cannot be compelled to pay for Pony Up Rescue

and Pasado's Safe Haven's voluntary choices as restitution.

Pasado's Safe Haven's voluntary decision to spare no expense to boarding these animals for several months was not reasonably foreseeable cost of the neglect on or about April 29, 2018. Similarly, Pony Up Rescue's decision to boarded Kissy the horse for 38 days and feed it hay worth $64 per day and walk it at $5 per day was its laudable but was not a reasonably foreseeable cost of the neglect. CP 126. The restitution award must be reversed.

F. CONCLUSION

Ms. Winger respectfully requests this Court to remand to the superior court with instructions to vacate all her first degree animal cruelty convictions and the second degree conviction related to Pearl the

cat, to lift the lifetime ban on owning animals. Or alternatively, to strike the restitution costs.

This brief complies with RAP 18.17 and contains approximately 11,994 words after excluding words exempted by the rule.

DATED this 25th day of August 2022.

Respectfully submitted,

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON, Respondent, v. THELMA WINGER, Appellant.	)))))))))	NO. 56514-5-II

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